1969

A. J. Limb, dba Limb Realty v. Federated Milk Producers Association, Inc., Federated Dairy Farms, Inc., And Kenneth T. Allred : Brief of Defendants-Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

A. J. LIMB, dba LIMB REALTY,
Plaintiff and Appellant,

vs.

FEDERATED MILK PRODUCERS ASSOCIATION, INC., FEDERATED DAIRY FARMS, INC., and KENNETH T. ALLRED,
Defendants and Respondents

Case No. 11548

Brief of Defendants-Respondents

Appeal from the Judgment of the Third Judicial District Court, in and for Salt Lake County, Utah
The Honorable D. Frank Wilkins, Judge

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FEDERATEDMILK PRODUCERS ASSOCIATION, INC., FEDERATED DAIRY FARMS, INC., and KENNETH T. ALLRED,
Defendants and Respondents

Case No. 11543

Brief of Defendants-Respondents

DISPOSITION IN THE LOWER COURT

The case below was disposed of upon the making of Motions by both parties for Summary Judgment by the entry of a Judgment in favor of Defendants-Respondents granting their Motion for Summary Judgment and denying the Plaintiff's motion for Summary Judgment. The Plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Defendants-Respondents, hereinafter referred to as the respondent, seeks to have the Summary Judgment sustained.

STATEMENT OF FACTS

The Respondent agrees in general with the statement of facts set forth by the Plaintiff-Appellant, hereinafter referred to as Appellant, but disagrees with several statements which appear to be argument or at least stated in less than a true factual manner. The statement that the Appellant " . . . (b) began to negotiate with . . . Sears . . . " (Appellant's brief, page 2) is perhaps a key question in this action and is not an admitted fact. Likewise the question of oral recision of Appellant's letter of authority is not precisely as set forth by Appellant on page 3 of his brief. Therefore, a short statement of fact will be set forth here with appropriate citations to the record and the depositions.

Some time prior to October 25, 1963, John Williamson, a real estate salesman employed by Limb Realty, the Plaintiff herein, contacted Federated Dairy Farms, Inc., one of the defendants, by means of a call upon Kenneth T. Allred, an employee of Federated. The purpose of this meeting was to see if the property at 723 South State Street, Salt Lake City, Utah, owned by Federated was for sale. This meeting probably took place approximately the 14th of October, 1963 (Williamson deposition, P. 4L 9-13).

After some preliminary discussions, Mr. Allred delivered to Mr. Williamson a letter dated October 25, 1963, which is attached to the complaint as Exhibit "A", (R-2) which provided an authorization for Mr. Williamson to negotiate with clients for the purchase of the property at 723 South State Street, Salt Lake City, Utah, and specifically listed, among other parties, Sears, Roebuck and Company as being one with whom Mr. Williamson had authority to deal.

After receiving the letter, Mr. Williamson and his broker, the Appellant Limb, claim to have set up a meeting with some representatives of Sears, Roebuck and Company. This meeting was held during the first half of November, 1963, (Limb deposition P. 19 L. 28-30). At the termination of that meeting, it was concluded that there wasn't any interest on behalf of Sears, Roebuck and Company (Limb deposition P. 18 L. 6-9).

After that initial meeting, Mr. Limb on perhaps one occasion in December of 1963, stopped in briefly to talk with one of the representatives of Sears, Roebuck and Company and again was told that he didn't think Sears was interested in the property (Limb deposition P. 20 L. 3-15), and had another contact with Sears, again a brief conversation when he stopped into the store, after the first of the year of 1964 (Limb deposition P. 20 L. 23). There was possibly one additional conversation in which Mr. Limb discussed the mater with somebody from Sears, and that was in April or May of 1964 (Limb deposition P. 23 L. 30; P. 24

L. 1-3). Except for the first meeting at which it is alleged a presentation was made, and which was approximately 45 minutes to one hour in length, the other meetings were approximately four or five minutes long and totalled approximately three or four contacts at most (Limb deposition P. 24, L. 16-24) and after April or May of 1964 Limb had no further contact with anybody from Sears, Roebuck in regard to the purchase of the subject property (Limb deposition P. 24 L. 25-38) and Williamson had no further contact with anybody from Sears in regard to the purchase of the property after January 1, 1964 (Williamson deposition, P. 21 L. 26-29). (On page 21 at Line 11, the question was "So it would be before the first of the year, before 1965?", which was an error in that the date should have been before "1964.")

Thus, insofar as Williamson was concerned, there was no contact with Sears by him in an attempt to sell the property after the end of the year 1963 and there was no contact by Limb after April or May of 1964.

On April 27, 1964, letters of termination of any authority granted John Williamson under the letter sued on in the case at bar as well as letters of termination to several other people who had been given identical limited authority in relation to selling the property to other prospective clients were sent at the direction of Federated Dairy Farms, Inc., (R-38). The wrong address was used for the one sent to Mr. Williamson, according to Williamson's affidavit on

file herein and his deposition; however, it is undisputed that an attempt at formal termination had been made and according to the affidavit of D. Howe Moffat (R-38), had it been known that any further claim was being made by Williamson or A. J. Limb, additional action would have been taken to terminate Williamson's authority or the ultimate sale finally entered into would not have been made.

In addition, a phone call was made by Mr. Allred, the Respondent's employee who had signed the letter which the appellant relies upon to Mr. Williamson, the Appellant's admitted agent and the person to whom the letter of October 25, 1963, was addressed advising him that a letter of recision was being mailed and if he had any prospects he should let Allred know before the property was listed with Wallace-McConoughy. (Allred deposition P. 16 L. 25-30, P. 17 L. 1-2).

Williamson's reply to this was that there was no further interest and to go ahead and list the property—that he was through with it. (Allred deposition P. 17 L. 3-4, an dL. 29-30, P. 18 L. 1-3) Williamson does not deny this phone call but does state he can't recall it and, therefore, doesn't believe it was made. (Williamson deposition P. 28 L. 22-30, P. 29, L. 1-20)

The property was listed May 22, 1964, with Wallace-McConaughy and in May of 1964 a large sign approximately 10' x 12' was painted on the fence immediately to the south of the gate facing State Street. This sign was approximately directly across the street

from the existing Sears, Roebuck building. The sign held the property out for sale and had the name of the realtors, Wallace-McConaughy, in large conspicuous letter as the realtors to contact. (R-31)

The property was sold in April of 1966, through Wallace-McConaughy and a full commission was paid upon said sale. It was thereafter that Williamson and Limb pressed their claim for a commission based upon the letter of October 25, 1963.

STATEMENT OF POINTS RELIED UPON

POINT I

The Respondents were entitled to Summary Judgment and the same should be sustained by this court on the grounds that the letter of October 25, 1963, was (a) terminated by operation of law; and (b) without consideration.

POINT II

The Appellant is estopped to recover a commission upon at least three grounds.

POINT III

The relief requested by the Appellant cannot be granted because all of the defenses of Respondents have not been ruled upon.

ARGUMENT

POINT I. THE RESPONDENTS WERE ENTITLED TO SUMMARY JUDGMENT AND THE SAME SHOULD BE SUSTAINED BY THIS COURT ON THE GROUNDS THAT THE LETTER OF OCTOBER 25, 1963, WAS (a) TERMINATED BY OPERATION OF LAW; AND (b) WITHOUT CONSIDERATION.

A. *The letter of October* 25, 1963, *was terminated by law.*

The letter upon which the action is based and which is attached to the Complaint as Exhibit "A" (R-2) does not provide for any expiration nor for any period of time in which it will remain valid. The rule of law is as set forth in 12 *Am. Jur., 2d, Brokers, Section* 54 *at P.* 813, where it states as follows:

> "Where the contract is silent as to its duration, the rule generally followed, with some authority to the contrary, is that the broker is deemed to be given only a reasonable time within which to accomplish the object of his agency."

Although Am. Jur. states that what is a reasonable time is dependent upon the facts and circumstances of each case, and is ordinarily a question of fact, it further states this is not true if the evidence is susceptible of only one reasonable inference in that respect. To the same effect, see 25 *ALR* at 1555, where it is stated that what is a reasonable time is a question of law

at least where the facts are not in dispute and some cases hold it is a question of law regardless of a dispute of fact, citing *Coquyt vs. Shower*, 68 Colo. 89, 189, Pac. 606.

In the instant case, there is no dispute that there transpired 30 months from the date of the letter of October 25, 1963, to the date of the sale by others, and that there transpired at least 23 months from the time that either Williamson or Limb had any contact whatsoever with Sears, Roebuck in regard to the purchase of the property until it was sold by others.

In Appellant's second point, it is contended, if the discussion is analyzed, that it would make no difference how long a period of time elapsed from the time that the Plaintiff last made any effort to sell the property until the time it was actually sold, and that regardless of the time being one year or 100 years, he would be entitled to a commission even though he had in effect abandoned the contract. It is submitted that the cases herein clearly support the fact that an agreement without date terminates in a reasonable length of time and to hold otherwise would clearly do violence to the orderly conducting of business.

It is submitted that under the undisputed facts contained herein and the law as cited above, the Appellant had more than reasonable time in which to sell the property; in fact, did not do so, and the letter of authority had terminated by operation of law.

B. *The letter of October 25, 1963, is without consideration.*

The letter of October 25, 1963, was a unilateral offer to pay a commission upon sale of property and was not supported by consideration. The consideration for such an agreement is the procuring by the broker of a ready, willing and able buyer which, by admission of the facts in the instant case, did not occur through the efforts of the Appellant or his employee, Williamson.

See *Flinders vs. Hunter,* 60 Utah 314, 208 Pac. 526, 28 ALR 886 (1922). In this case, a document was delivered by the seller to the broker which promised a five per cent sales commission if the property was sold, and as in the case at bar, there was no termination date upon the agreement. The language regarding consideration was as follows:

> "For and in consideration of $1.00, the receipt of which is hereby acknowledged, I hereby appaint Fred Flinders Company exclusive agent to make sale of the property above described . . . "

Upon a trial the Court found that in fact the agreement was not supported by consideration and that the Defendant had a right to terminate the agreement at any time because the agreement was not supported by consideration and did not bind the Defendant.

On appeal, this court supported this proposition and quoted as follows from *Mecham on Agency,* First Ed. Sec. 207, as follows:

> "Thus, where one is given authority to sell the lands or other property of another and is to have a certain commission or share out of the proceeds for making the sale, the authority may be revoked at the will of the principal even though in terms it was declared to be exclusive or irrevocable . . . The interest in the commissions to be earned and in the moneys expended in endeavoring to carry out the agency is not sufficient to prevent revocation."

In the case at bar, the writing given to Williamson does not recite any consideration running from Williamson to Respondent as does the agreement in the *Flinders* case and there is no allegation of consideration contained in Appellant's complaint.

In *Flinders vs. Hunter, supra,* this Court quotes with favor as follows:

> "In a note following the decision in Paschall vs. Gilliss, Ann. Cas. 1913E, at page 788, the writer of the note, under the subject 'Negotiations with Broker Terminated,' states his conclusions from the decision thus: "Although the broker may be the means of first bringing the parties together and of opening negotiations with them, yet if the negotiations are unproductive and the parties in good faith withdraw therefrom and abandon the proposed purchase and sale, a subsequent renewal of negotiations followed by a sale at a less price does not entitle the broker to the commissions, as he cannot be said to be the procuring cause of the sale".
>
> "In view, however, that the Court further found that the *plaintiff was not the procuring*

case of the sale in question and that it was effectuated solely through the efforts of the defendant, plaintiff is in no event entitled to recover a commission. To that effect are all the authorities." (emphasis added).

That the Appellant was not the procuring cause, or in fact had any effect whatsoever in the case at bar, see the Affidavit of Michael B. Kauffman. Mr. Kauffman, at the time of the purchase was manager of the Salt Lake City Sear's store, says as follows in the undisputed Affidavit which must be taken as true:

> " . . . that during said period of time (that negotiations with Wallace-McConaughy were being conducted) he personally conducted said negotiations; that he has never had any contact with A. J. Limb or John Williamson in relation to said purchase and at the time of negotiating for the purchase of said property, he was not aware of any prior contact made by either A. J. Limb or John Williamson with Sears-Roebuck and Company and any such contact which said parties may have had had no effect upon the negotiations for the purchase of the property in April, 1966, and in no way effected or influenced the said negotiations which ultimately lead to the purchase of the property by Sears-Roebuck and Company." (R34-35).

It, therefore, becomes apparent in the case at bar by the uncontroverted facts found in the pleadings and the depositions that (1) the Appellant never presented to Federated any buyer ready, willing and able to purchase the property (Limb deposition P. 42L. 25-30) and as noted above, there was no attempt on the

part of the Appellant or any of his employees to sell the property to Sears after, at latest, May of 1964, which was only the last of approximately three contacts where inquiry was made as to whether there was any interest, which contacts were very short conversations of only four or five minutes each. There was only one attempt, according to the Appellant and his salesman where the property was ever specifically mentioned as being for sale and that was in November of 1963 and there were, in fact, no actual sales efforts thereafter.

In that meeting, the only one upon which the Appellant relies, according to the affidavit of Mr. Johnson, *the subject property was only one of several that were mentioned* and the Appellant was told at that time that Sears-Roebuck and Company was not interested in the purchase of the property. As a matter of fact, said affidavit states in part as follows:

> "The only discussion had concerning the property located at 725 (723) South State Street was that *Mr. Limb stated that he had a listing on said property.* In response to this statement it was stated that Sears-Roebuck and Company was not interested in the purchase of the property as it was located across the street from Sears-Roebuck and Company location." (emphasis added) (R-81)

The Appellant fails specifically to note that the agreement uses the word "negotiate" as follows: "This is to authorize you to negotiate with clients for the purchase of 732 South State Street . . ." The word is again

used in paragraph 3 where it states as follows: " . . . You are only authorized to negotiate with the following persons . . . " Now, it may be a play on words, but there has not been a single claim by the Appellant that they ever *negotiated* for the purchase of the property.

Webster's Third New International Dictionary Unabridged (1961) defines the word negotiate in the sense that it would apply to the matter at bar as follows:

> "to communicate or confer with another so as to arrive at the settlement of some matter; meet with another so as to arrive through discussion at some kind of agreement or compromise about something; come to terms esp. in state matters by meetings and discussions . . .; to carry on business or trade . . .; to deal with (some matter or affair that requires ability for its successful handling); MANAGE, HANDLE, CONDUCT . . .; to arrange for or bring about through conference and discussion; work out or arrive at or settle upon by meetings and agreements and compromises . . .; to encounter and dispose of (as a problem, challenge) with completeness and satisfaction; tackle unsuccessfully . . .; COMPLETE, ACCOMPLISH."

It becomes apparent even from the depositions of the Appellant and Mr. Williamson that there were never any "negotiations" and according to Mr. Johnson's Affidavit (R-81) the most that can be said that was ever done in relation to Sears-Roebuck was a meeting at which Limb told the representatives of Sears-Roebuck that he had the subject property as well as

other properties listed for sale, at which time he was told that Sears was not interested in the property. The sole claim made by Appellant is that a meeting was held with Mr. Johnson and Mr. Jenkins at Sears-Roebuck at which the property was mentioned. There was not even a claim that this was the only property mentioned but only a claim that this property was, in fact, mentioned.

In reading the contract which must be construed as a whole, it would appear that the contract clearly contemplates that *at the very least,* some actual negotiations regarding the purchase of the property must be undertaken and by the depositions of the Appellant Limb and his agent Williamson, it is clear that at no time did Sears-Roebuck ever evidence an interest in the property nor were there any negotiations for the purchase of the property in the sense that the parties attempted to put a sale together.

As the term "negotiation" is defined in both common usage and by Webster's Dictionary as set forth above, it becomes very clear that "negotiation" involves communication and conference in an attempt to arrive at some kind of an agreement, compromise or to bring something about. There is no claim by the Appellant that the terms of any proposed purchase were discussed such as price, the date of occupancy, the method by which the purchase price was to be paid, the details of the ground including whether any rights of way or easements were connected with it, whether there was

any outstanding obligation against it, or any other of the myriad details that are ordinarily and necessarily discussed when a person is "negotiating" for the sale or purchase of real property.

Under the circumstances, it is respectfully urged that the letter of October 25, 1963, was without consideration and in addition thereto, the Appellant not only not having been the actual procuring cause of the sale or havonig had any effect on the sale to the ultimate purchaser, but also not having *negotiated* for the sale, he is not entitled to any commission.

POINT II. THE APPELLANTS IS ESTOPPED TO RECOVER A COMMISSION UPON AT LEAST THREE GROUNDS.

On May 2, 1964, after the Appellant had ceased any further activities in an attempt to sell the property, a listing of the subject property was made with Wallace-McConaughy, a real estate sales organization in Salt Lake City, Utah. On May 14, 1964, a large sign approximately 10' x 12' located on the fence to the south of the gate facing State Street and across State Street from Sears, Roebuck was painted showing the dimensions of the property, holding it out for sale and it contained the name of "Wallace-McConaughy" in large conspicuous letters as the realtor offering the property. (R-31-32)

The Appellant admits in his deposition (Limb deposition, P. 30 L. 2) that he saw that sign and although

he cannot recall the exact date, he thinks it was in the end of 1964 and he further admits that he saw the name "Wallace-McConaughy" on the sign as being the listing agent (Limb deposition P. 30 L. 10-12), and it is further admitted by Mr. Limb that he saw the sign after he had his last contact with Sears, Roebuck (Limb deposition P. 30 L. 21-25). Mr. Williamson, Limb's employee, also admits having seen the sign and that it had the name "Wallace-McConaughy" as the realtor or broker on it (Williamson deposition P. 31 L. 14-18). Mr. Williamson also indicates that he discussed this matter with Mr. Limb at the time that he first became aware of the fact that the property was listed with another broker (Williamson deposition P. 30 L. 24-30; and P. 31 L. 1-13) and yet neither the Appellant nor his employee, after having become aware of the fact the property was being held out for sale by other parties and discussing the matter, made any contact with Federated, the seller, Wallace-McConaughy, the realtor involved, or Sears, Roebuck and Company (Limb deposition P. 31 L. 3; Williamson deposition P. 37 L. 13-30; P. 38 L. 1-13). Mr. Williamson even admits that in his reading the sign with Wallace-McConaughy's name on it ,it would ordinarily have lead him to believe if Wallace McConaughy sold the property a commission would be paid to Wallace McConaughy (Williamson deposition P. 38 L. 25-28).

In September of 1965 demolition of the building on the property was started at the direction of Fede-

rated Dairy Farms, Inc., and demolition was completed in November of 1965 (R-33). Both Limb and Williamson admit in their depositions that they observed the demolition of the building (Williamson deposition P. 32 L. 15-18; Limb deposition P. 31 L. 12-18) and both parties admit that they again made no inquiry of anyone from Federated in regard to the demolition of the building and as to whether or not it would change any of the provisions of sale or whether it had in fact been sold (Limb deposition P. 32 L. 9-12; L. 18-20; Williamson deposition P. 33 L. 10-21).

It is admitted by Williamson, the agent of the Appellant, Limb, that the fact that the building was taken off the property would have some effect upon the value of the property either increasing or decreasing the value, depending upon the desire of the purchasers (Williamson deposition P. 33 L. 27-30; and in particular lines 20-22) and yet it is admitted as noted above that no inquiry was made by either Williamson or Limb of anybody, even though they had seen the sign on the property holding it out for sale by another broker, had discussed the matter between themselves, (Williamson even had told Allred the property would be easier to sell if the building were removed). (Williamson deposition P. 33 L. 3-6) and had seen the demolition of the building on the property. This in spite of the fact that it is admitted that in the ordinary course of events the realtor who lists the property would be expected to receive a commission and that

the demolition on the property would change its value in one way or another to any prospective purchaser and would make it easier to sell the property according to Williamson. In other words, with a sign on the property from May of 1964 until the sale of the property in April, 1966, *a period of* 23 *months,* and with the building having been removed from the property by the end of November of 1965, *a period of five months prior to the sale,* still the Appellant and his agent made no contact with Federated in particular, or anybody for that matter, to note that they still claimed some interest in the sale of the property.

Under the circumstances, it is respectfully urged that the Appellant is estopped from claiming any commission. In 28 *Am. Jur. 2d, Estoppel and Waiver,* Section 35 (p. 640), estoppel in its broadest sense is set forth as follows:

> "Broadly speaking, the essential elements of an equitable estoppel or estoppel in pais, as related to the party to be estopped, are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise, than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the

means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice . . .

"Equitable estoppel arises from the conduct of a party, using the word 'conduct' in its broadest meaning as including his spoken words, his positive acts, and his silence when there is a duty to speak ,and proceeds on the consideration that the author of a misfortune shall not himself escape the consequences and cast the burden on another. Accordingly, it holds a person to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled, to his injury."

28 *Am. Jur. 2d, Estoppel and Waiver,* Sec. 53 p. 665), discusses estoppel by silence or inaction and says as follows:

"The authorities make it abundantly clear that an estoppel may arise under certain circumstances from silence or inaction as well as from words or actions. Estoppel by silence or inaction is often referred to as estoppel by 'standing by,' and that phrase in this connection has almost lost its primary significance of actual presence or participation in the transaction and generally covers any silence where there are knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the

maxim 'one who is silent when he ought to speak will not be heard to speak when he ought to be silent.' Silence, when there is a duty to speak, is deemed equivalent to concealment. Moreover, there are cases where the mere silence of the estopped party and his failure to assert the right later claimed will be construed as a representation that he does not have the right which he later attempts to assert. . . .

"In general, a person is required to speak only when common honesty and fair dealing demands that he do so, and in order that a party may be estopped by silence, there must be on his part an intent to mislead, or at least a willingness that others should be deceived, together with knowledge or reason to suppose that someone is relying on such silence or inaction and in consequence thereof is acting or is about to act as he would not act otherwise."

The following discussion in 28 *Am. Jur. 2d, Estoppel and Waiver,* Section 58 (p. 675) sets forth an estoppel by delay, which perhaps is closely related to the question discussed in the first point of this brief to-wit: the failure to perform within a reasonable length of time and says as follows:

"Estoppel by delay is closely related to, and perhaps should be included in, estoppel by silence or inaction. It is also closely related to estoppel by acquiescence, since delay in the assertion of rights or in the raising of objections is often an indication of acquiescence.

"Although a slight delay is less likely than a more extended one to be considered a ground

of estoppel, the questions whether a delay is such as to give rise to an estoppel can never be determined merely by measuring the length of the delay in days or months or years, since what would be inexcusable delay in one case might not be inconsistent with diligence in another. In other words, while delay may, when associated with other essential conditions, be an element in, or a basis for, estoppel, as indicating an intention to abandon rights or a negligent failure to assert them, there is no necessary estoppel arising from the mere lapse of time alone.

"As long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right is then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right.

And 28 *Am. Jur. 2d, Estoppel and Waiver,* Section 61 (p. 683) in discussing estoppel by negligence where there is no requirement or intention on the part of the person to be estopped states as follows:

"Negligence, generally. The statement has been made that the doctrine of estoppel is usually applied to cases where the party sought to be estopped was guilty of some negligence or lack of diligence, under the principle that if he is guilty thereof he must take the consequences of his own acts which mislead others to act to

their injury. Although an intention to influence the conduct of another is ordinarily essential to the creation of an equitable estoppel, it has been held in many cases that estoppel may arise, even in the absence of any intention of this character, from the culpable negligence of one party by which another has been mislead. Thus, an equitable estoppel may arise when one through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief."

In relation to the last quote from Am. Jur., Williamson, whois the admitted agent of the Appellant, admits at P. 41 L. 10-13 of his deposition that he not only didn't contact Federated but that perhaps he should have as follows:

Q. Why didn't you contact Federated or Mr. Allred and advise him of your feelings in regard to this matter?" (relating to the listing with Wallace-McConaughy)

A. I can't answer that. *I would have to stay that perhaps this should have been done but it wasn't.*" (emphasis added)

A leading case in Utah on Estoppel is ***Kelly vs. Richards,*** 95 Utah 560, 83 P2d 731, 129 ALR 164 (1938), where it is said in regard to estoppel as follows:

"It is elementary that as a matter of pleading an estoppel in pais exists only when facts are alleged which show that one person has by his words, deeds, or conduct so behaved that another

person in good faith relying upon such conduct has been intentionally led thereby to change his position for the worse and who would not so have changed his position except for the conduct of the other party.

"This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through cupable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for the truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained. 21 *Corpus Juris, P.* 1113, 1114, 1115.

Essential Elements - a. In General.

"In order to constitute this kind of estoppel there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice. To constitute an 'estoppel in pais' there must concur an admission, statement, or act inconsistent with the claim afterward asserted, action by the other party thereon and injury to such other party. There can be no estoppel if either

of these elements are wanting. They are each of equal importance. 21 Corpus Juris, pp. 119, 1120. See also, Pomeroy's Equity Jurisprudence (4th Ed.) p. 1644; Bigelow on Estoppel (6th Ed.) pp. 603 ,604."

"It is essenial therefore that the representation, whether it arises by words, acts or conduct, must have been of a material fact; that it must have been willfully intended to lead the party setting up the estoppel to act upon it or that there must have been reasonable grounds and cause to think that because thereof he would change his position to do some act or take some course on faith in the conduct, and that such action results to his detriment if the person sought to be estopped may now repudiate the words or interpretation placed upon such conduct. This does not require an actual intent to defraud but only that the circumstances and conduct were such as would perpetrate a fraud or unfair advantage if the party could now deny what he had induced or suffered another to believe and act upon."

Although there are a number of Utah cases relating to estoppel, none have been found which are specifically in point regarding estoppel in brokerage cases. However, that the doctrine of estoppel is recognized in Utah is borne out by the case of *Tanner vs. Provo Reservoir Company*, 99 Utah 158, 103 P 2d 134 (1940), where the question of estoppel was raised by the Defendant against the Plaintiff where the Plaintiff had consulted and advised the Defendant in a prior suit regarding the adjudication of water rights, but

had not revealed that he himself held a claim that related to that prior suit. The Court held that the Plaintiff was estopped and said as follows:

> "Plaintiff is estopped to challenge the decree, not only because he is bound by reason of his Dixon holdings, but because he failed to disclose his claims when defendant was relying upon him and paying him compensation to do so."

Estoppel is also recognized as being applicable in Utah in *Farmers and Merchants Bank vs. Universal C.I.T. Credit Corporation,* 4 Utah 2d 155, 289 P 2d 1045 (1955), where the Court, quoting an Eighth Circuit case, said as follows in regard to equitable estoppel:

> "Equitable estoppel is bottomed upon the notion that, when one person makes representations to another which warrant the latter in acting in a given way, the one making such representations will not be permitted to change his position when such change would bring about inequitable consequences to the other person, who relied on the representations and acted thereon in good faith * * * "

It should be noted that in this case there was not estoppel based upon silence or inaction, but estoppel based upon an affirmative action which is not entirely the case at bar, but the case is cited for the purpose of showing that equitable estoppel is a well-accepted doctrine in Utah.

Another case which is somewhat analagous is *Migliaccio vs. Davis,* 232 P2d 195, 120 Utah 1 (1951),

wherein the Court set forth a quotation from 19 *Am. Jur.*, P 364, which is in substance the same as the quotation set forth above from 28 *Am. Jur.* 2d in regard to equitable estoppel and further noted at p. 199 that where the person estopped carried on a course of silence where he should have spoken which was calculated to and did mislead the other party, that he was estopped now to make a claim based upon the facts that he knew at that time but did not disclose.

That inaction or silence may amount to both a misrepresentation and concealment upon which to base estoppel is recognized in *Utah State Building Commission vs. Great American Indemnity Company,* 140 P2d 763, 105 Utah 11 (1943) where the Court said as follows:

> "It is true as stated by our court in the case of Hilton vs. Sloan et al., 37 Utah 359 at page 373, 108 P. 689, at page 694. 'It is almost unnecessary to add that mere inaction or silence may, under peculiar circumstances, amount to both misrepresentation and concealment', which may amount to an estoppel. This doctrine is referred to and approved in the later case of Tanner vs. Provo Reservoir Company et al., 76 Utah 335, 298 P. 151.
>
> "It is generally held that in order for silence to work an estoppel, there must be a legal duty to speak, or there must be something willful or culpable in the silence which allows another to place himself in an unfavorable position by reason thereof. See Eltinge vs. Santos, 171 Cal. 278, 152 P. 915, Ann. Cas. 1917A, 1143."

That there was a duty to speak seems almost beyond argument. For well over 23 months and perhaps for as long as 25 or 26 months, the Appellant and his agent Williamson, had no contact with Sears, Roebuck and made no attempt to sell the property. For a period of in excess of 23 months, a sign was on the property holding it out for sale by others, and for at least 16 months of that period, if perhaps not the full period, both Williamson and Appellant knew of the sign and the contents thereof where another broker was listed and yet neither did anything in relation to contacting what they would have you believe was their most active prospect as a purchaser, Sears, nor the seller, Federated, nor the new broker, Wallace-McConaughy. There is no claim in the pleadings or the record that any of the transactions and negotiations for the ultimate sale which was made through Wallace-McConaughy, were ever conducted or carried on by the Appellant, or his agent, Williamson, and yet during all that period of time they remained silent, laying back, expecting that they then could raise a claim for a commission that they in fact had not earned. They had a positive duty not only in the sense of good business practices as well as good moral practices, but if, in fact, they were at that time still agents of Federated for the purpose of selling the property, they owed to Federated the highest duty to speak as is said in 12 *Am. Jur. 2d, Brokers,* Section 84 (p. 837):

> "A broker is a fiduciary and holds a position of trust and confidence. He is required to exer-

cise fidelity and good faith toward his principal in all matters within the scope of his employment . . . he cannot put himself in a position antagonistic to his principal's interest, by fraudulent conduct, acting adversely to his client's interest, *or by failing to communicate information he may possess or acquire which is or may be material to his employer's advantage, or otherwise.*" (emphasis added).

And it is the general rule that where a broker fails to live up to the requirements placed upon him by the principal-agent relationship, he is not entitled to a commission if any actually be earned, and in addition thereto, in some cases is held liable for damages. To this effect see ***Reese vs. Harper,*** 8 Utah 2d 119, 329 P 2d 410 (1958) where it is said as follows:

> "Because of the specialized service the real estate broker offers in acting as an agent for his client there arises a fiduciary relationship between them; it is incumbent upon him to apply his abilities and knowledge to the advantage of the man he serves; and to make full disclosure of all facts which his principal should know in transacting the business. Failure to discharge such duty with reasonable diligence and care precludes his recovery for the services he purports to be rendering."

Appellant is on the horns of a dilemma in that if he now claims that he was an agent of the Respondent Federated at the time that he knew the property was being held for sale by others and saw the building being demolished and failed to speak, then in addition to being estopped by his inaction, he is further prevented

from recovering any commission, by reason of the breach of his fiduciary responsibility to his principal. And yet, on the other hand, if he claims he did not have such duty at the time, he has no ground upon which to claim any commission, because if he was not an agent of Federated at the time he had no further right to deal with the property and thus no right to commission.

In Appellant's Point III it is argued simply that the doctrine of equitable estoppel is not applicable in this case because the Respondent had full knowledge of the facts known to the Appellant. However, the Appellant simply fails to see the point made. It is admitted by the Appellant that a formal effort to terminate any rights that Appellant may have had under the contract was made, and this is admitted in the pleadings and in the Appellant's brief. But the uncontroverted affidavit of D. Howe Moffat states that had he known that the Appellant would have claimed a commission upon the sale to Sears, additional action would have been taken to terminate any rights by Williamson or the sale would not have been made. (R-38-39) The fact that was not disclosed which Williamson and Limb had in their knowledge was that they still contended that they had a commission coming if a sale to Sears was made.

In view of the demolition of the building which, according to Williamson and Limb would have changed the value of the property, and the huge sign placed on

the property holding it out for sale by another broker, it would appear obvious that a person claiming to be the agent of the owner of the property would have made some contact with him to determine the current status of the property.

The Appellant stresses in his brief that the sign did not specifically make overtures to Sears or anyone else, but it would also seem obvious that the sign being placed on the property and holding the same out for sale and being directly across the street from Sears-Roebuck did not limit its overtures to persons other than Sears and as noted in the herein, the duty to speak on behalf of someone claiming to be an agent is much greater and much more compelling than the ordinary duty to speak in an estoppel situation.

The Appellant in his brief simply ignores the fiduciary responsibility that he must bear toward his principal if he is to claim a commission under any kind of an arrangement and only argues that he is not estopped because the knowledge that he should have revealed was also within the knowledge of the respondent. However, the authorities he cites do not involve the fiduciary relationship. The authorities that he relies upon in relation to his argument of the inapplicability of the doctrine of estoppel relates to the ordinary situation of two parties dealing at arms' length and not a relationship based upon a fiduciary responsibility caused by the principal-agent relationship.

As pointed out herein, the Appellant is in the position of:

(1) Claiming that he was in fact the agent of the defendants at the time of said sale so that he can claim a commission, but is not entitled to the commission because of his failure to carry out his fiduciary responsibility in relation to disclosures that he should have made to the principal; or

(2) In the position of admitting that he was not an agent at that time and thus has no right to a commission.

Under either set of facts it is respectfully submitted that the Respondents are entitled to Summary Judgment as granted below dismissing Appellant's complaint.

POINT III: THE RELIEF REQUESTED BY THE APPELLANT CANNOT BE GRANTED BECAUSE ALL OF THE DEFENSES OF RESPONDENT HAVE NOT BEEN RULED UPON.

The Appellant, in his brief, argues that the trial court erred in not granting his Motion for Summary Judgment but fails to argue that the court also erred in granting the Respondents' Motion for Summary Judgment. It would thus appear that the Appellant is simply saying that he should have Summary Judgment but that it is all right for the Respondents to have Summary Judgment also. This, obviously, cannot be

the case and so it is presumed by Respondents that the Appellant, in his Point I, is really arguing that Summary Judgment should have been granted for Appellant and that the Summary Judgment granted the Respondents should be reversed. This court is in no position to grant the relief asked by the Appellant for the reason that all of the defenses of the Respondents have not been ruled upon. The Respondents, in their answer, have a second affirmative defense and plead that the letter of October 25, 1963, upon which the Appellant sued is so vague as to be unenforceable. The Respondents also have raised the defense of an oral recision.

The Motion for Summary Judgment did not consider these defenses and they obviously cannot be considered for the first time on appeal but for that very reason, if the court fails to sustain the judgment below, the only relief that can be awarded to the Appellant would be to remand the case for trial so that the Respondents will have the opportunity of proving the defenses that have not been argued heretofore, as well as attempting to prove the other defenses which the court below found to be valid as a matter of law based upon the undisputed facts.

CONCLUSION

It is respectfully urged that this court should sustain the judgment awarded below for the following reasons:

1. There was no performance of the obligation to procure a ready, willing and able buyer within a reasonable time nor, in fact, any activity or negotiation by the Appellant that had any effect at all upon the ultimate purchase of the property by Sears-Roebuck and Company and anything that Appellant, in fact, did was not within a reasonable time and the authority granted by the letter of October 23, 1963, and any obligation thereunder became terminated by the passage of time and by action of law:

2. There was no consideration for the letter of October 25, 1963, as it was a unilateral contract and the consideration was to have been performance by the Appellant, which admittedly was not done;

3. The Appellant is estopped on any one of at least three grounds from claiming any commission, to-wit:

A. Estoppel by silence or inaction.

B. Estoppel by negligence.

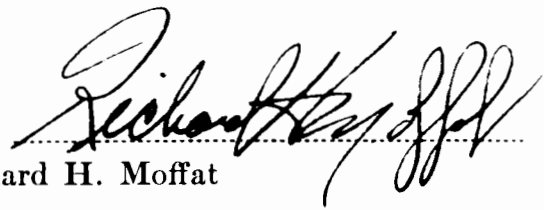
C. Estoppel by breach of his fiduciary relationship because of his silence or inaction.

4. Appellant is not entitled to Summary Judgment in addition to all the foregoing because of the fact that all of Respondents' defenses have not been ruled upon and a ruling on all of said defenses cannot be made for the first time on appeal.

It is, therefore, respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submited,

MOFFAT, IVERSON and TAYLOR



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